In the Supreme Court of the United States

October Term, 1972

No. 72-734

UNITED STATES OF AMERICA,
Petitioner,

vs.

JOHN P. CALANDRA,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether the government may expand the invasion of privacy resulting from an illegal search and seizure by compelling the victim to submit to questioning before the grand jury about the evidence seized.

STATEMENT OF FACTS

On December 15, 1970 federal agents executed search warrants directed at respondent John P. Calandra's residence and at his place of employment, the Royal Machine

and Tool Company (A. 5-6, 83a).[1] The warrants were issued in connection with an investigation of suspected illegal gambling activities and called for the seizure of bookmaking records and wagering paraphernalia. An extensive and meticulous four hour search of the two-story building housing the Royal Machine and Tool Company (A. 46-47) failed to produce any significant evidence of illegal gambling activities (A. 7-10).

Nevertheless a wide variety of items and documents were seized, including books and records of the company, stock certificates and address books (A. 7-10). Among the documents seized were papers containing accounts of periodic loan repayments to Calandra, which the government suspected might be loansharking records since the borrower was known to have been a victim of extortionate credit transactions (A. 50).

Its curiosity piqued by the cryptic accounts of loan repayments, the government subpoenaed Calandra to appear before a special grand jury on August 17, 1971 to interrogate him regarding questions generated by the seized evidence (A. 75). Calandra declined to testify, invoking his Fifth Amendment privilege not to incriminate himself. Whereupon the government moved the district court for an order granting Calandra immunity, pursuant to 18 USC §2514, and compelling him to testify (A. 30-31). Calandra moved to postpone the immunity hearing on the ground that he had not been given prior notice required by F.R.Civ.P. 5(a), 5(b) and 6(d) (A. 35-36), desiring to use the time afforded by the Rules to develop his contemporaneously filed motion for suppression and return of the seized evidence (A. 37, 52a, 41). The district court granted the postponement and set the

[1] Appendix references followed by "a" refer to items contained in the joint appendix filed in the court of appeals but not included in the printed appendix filed in this Court.

matter for an oral hearing to be held on August 27, 1971.

The government conceded that the questions intended to be put to Calandra before the grand jury were based upon the search and seizure of December 15, 1970 (A. 75). Calandra stipulated that he would refuse to answer any questions before the grand jury even if immunized (A. 53).[2]

On the basis of the moving papers and stipulated facts, without necessity of evidentiary hearing, the district court concluded that the search warrant was issued without probable cause and that the search exceeded the scope of the warrant, and issued its order suppressing the items seized, directing their return to Calandra, and specifying that he need not answer any questions before the grand jury based on the evidence in question (Petition, App. D, p. 45).

On the government's appeal to the United States Court of Appeals for the Sixth Circuit, a three-judge panel of that court unanimously affirmed the judgment of the district court (Petition, App. A, pp. 11-24).[3] On February

[2] The government argued in the district court (but not in the court of appeals) that Calandra's motion was premature since he could make the motion in a contempt hearing. The district court disagreed. Because it was stipulated that the government intended to immunize Calandra and that he intended not to answer questions even at peril of contempt, the contempt route would have been a revolving door, returning the parties to their previous positions without changing their postures (Petition, App. D, p. 30).

[3] The court of appeals found it unnecessary to discuss in detail the questions pertaining to the validity of the search warrant and search, concluding in a footnote that "the district judge was clearly correct in finding that the warrant utterly failed to establish probable cause to search Royal Machine and Tool Company for gambling paraphernalia, and further that the search itself was a general one which far exceeded the scope of the warrant and the permissible limits of the Fourth Amendment." (Petition, App. A, p. 23). The government does not contest this aspect of the ruling in this Court (Brief for the United States, p. 8).

20, 1973 this Court granted the government's Petition for a Writ of Certiorari to review that judgment.

SUMMARY OF ARGUMENT

A

Although criminal defendants may not challenge their indictments on the basis of the evidence presented to the grand jury and grand jury witnesses are not entitled to raise objections based on those evidentiary rules designed to assure relevance or probity, it has long been recognized that witnesses may withhold testimony from a grand jury on the basis of constitutional, statutory or even common law privileges guarding against revelation or protecting relationships. This Court has specifically upheld the right of grand jury witnesses to withhold evidence on Fourth Amendment grounds. *Silverthorne Lumber Co. vs. United States,* 251 U.S. 385 (1920); *Hale vs. Henkel,* 201 U.S. 43 (1906).

Here the government sought to expand its invasion of respondent Calandra's privacy resulting from the illegal search and seizure, by compelling him to submit to questioning before the grand jury about the evidence seized. The district court and a unanimous court of appeals upheld his right to resist. The government, seeking to appeal to this Court's growing disenchantment with the exclusionary rule, characterizes the judgment of the courts below as simply an extension of that rule, having minimal deterrent effect at great cost to grand jury efficiency and the administration of justice. However, the interest at stake on the side of respondent Calandra's right to resist is not merely, or even primarily, the enhancement of the deterrent effect of the exclusionary rule, but rather the prevention of a further invasion of that privacy which the

Fourth Amendment was designed to protect. Unlike the usual suppression situation, the invasion of privacy has not yet been completed and can still be partially prevented. Thus, it is not this Court's devotion to the exclusionary rule *remedy* that is tested by this case, but rather its fidelity to the Fourth Amendment *right* of privacy itself that is in issue.

The government's dire forecast of intolerable interference with grand jury proceedings is unsupported by either empirical or jurisprudential evidence of such disastrous consequences in prior related experience, nor by the particular facts of this case. What minimal delay may be involved in recognizing the right of grand jury witnesses to assert, under appropriate limitations, their Fourth Amendment rights cannot justify the substantial harm to privacy, "the right most valued by civilized men." *Olmstead vs. United States,* 277 U.S. 438, 478 (1928) (Mr. Justice Brandeis dissenting).

B

Respondent Calandra resists the effort to compel his testimony, not for the purpose of preventing the introduction of evidence already disclosed (against himself or others), but rather to prevent the government from further invading his privacy by compelling disclosure of additional matters, as a direct result of its unlawful search and seizure. The government's contention that Calandra's privacy interest is vindicated by a grant of immunity from prosecution confuses the Fourth Amendment right (privacy) with the remedy (the exclusionary rule). Although a grant of immunity vindicates the constitutional interest protected by the Fifth Amendment privilege against self-incrimination, it does nothing to vindicate the right of privacy protected by the Fourth Amendment. According-

ly this Court has upheld the standing of grand jury witnesses to assert privacy claims notwithstanding grants of immunity from prosecution. *United States vs. Egan*, 408 U.S. 41, 45 (1972); *Hale vs. Henkel*, 201 U.S. 43 (1906).

ARGUMENT

A. A GRAND JURY WITNESS IS ENTITLED TO RAISE FOURTH AMENDMENT OBJECTIONS TO QUESTIONS CONCEDEDLY DERIVED FROM A SEARCH AND SEIZURE WHICH COULD BE DETERMINED FROM THE FACE OF THE WARRANT AND AFFIDAVIT TO BE CLEARLY ILLEGAL.

1. It is not true, as the government would have the Court believe, that grand jury proceedings have been, or must be, wholly impervious to all evidentiary rules and limitations.[4] Although criminal defendants may not challenge their indictments on the basis of the evidence presented to the grand jury and grand jury witnesses are not entitled to raise objections based on those evidentiary rules designed to assure relevance or probity, it has long been recognized that witnesses may withhold testimony from a grand jury on the basis of constitutional, statutory, or

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[4] Most of the cases cited by the Government for this proposition are wholly inapposite to the adjudication of the rights of a grand jury witness, as *United States vs. Blue*, 384 U.S. 251 (1966); *Lawn vs. United States*, 355 U.S. 339 (1958); *Costello vs. United States*, 350 U.S. 359 (1956); *United States vs. Johnson*, 319 U.S. 503 (1943); and *Holt vs. United States*, 218 U.S. 245 (1910) all involved efforts by criminal defendants to challenge their indictments, and none considered the rights of grand jury witnesses; while *Blair vs. United States*, 250 U.S. 273 (1919) (which did reject the claim of a witness to challenge the grand jury's jurisdiction) recognized that the duty to give evidence to the grand jury

". . . is subject to mitigation in exceptional circumstances; there is a constitutional exemption from being compelled in any criminal case to be a witness against oneself . . .; some confidential matters are shielded from considerations of policy, and perhaps in other cases for special reasons a witness may be excused from telling all that he knows." *Id.*, at 281-82.

even common law privileges guarding against revelation or protecting relationships.[5]

Specifically this Court has, on at least two occasions, upheld the right of grand jury witnesses to withhold evidence on Fourth Amendment grounds. *Silverthorne Lumber Co. vs. United States,* 251 U.S. 385 (1920); *Hale vs. Henkel,* 201 U.S. 43 (1906).

The government understandably seeks to fudge the distinction between the interest of an indicted defendant in attacking his indictment on grounds of the incompetency of evidence presented to the grand jury, and the right of a witness to resist compulsion of his testimony before the grand jury. However, it is, both conceptually and functionally, a crucial distinction, recognized by this Court in *Gelbard vs. United States,* 408 U.S. 41, 60 (1972). A defendant's interest in not being branded a criminal by unreliable or prejudicially irrelevant evidence can be vindicated in his subsequent trial, while the breach of a witness' privacy or protected confidential relationship can never be repaired.

The government, seeking to appeal to this Court's growing disenchantment with the exclusionary rule,[6]

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[5] See, e.g., *Hoffman vs. United States,* 341 U.S. 479 (1951) (Fifth Amendment privilege against self-incrimination); *Gravel vs. United States,* 408 U.S. 606 (1972) (Article I speech or debate clause); *Blau vs. United States,* 340 U.S. 332 (1951) (husband-wife privilege); *Alexander vs. United States,* 138 U.S. 353 (1890) (lawyer-client privilege); *Continental Oil Co. vs. United States,* 330 F.2d. 347 (9th Cir. 1964) (attorney-client privilege); *In Re Verplank,* 329 F.Supp. 433 (C.D. Cal. 1971) (clergyman-communicant privilege); *Application of Grand Jury,* 286 App. Div. 270, 143 N.Y.S.2d 501 (1955) (physician-patient privilege).

[6] See *Bivens vs. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388, 411-427 (1971) (Chief Justice Burger dissenting); *Coolidge vs. New Hampshire,* 403 U.S. 443, 490 (1971) (Mr. Justice Harlan concurring) *Schneckloth vs. Bustamonte,* U.S. , 41 U.S.L.W. 4726, 4741 (May 29, 1973) (Mr. Justice Powell concurring).

characterizes the judgment of the courts below as an unprecedent extension of that rule into the sacred province of the grand jury. However, in the only case ever decided by this Court on the question of whether the victim of an illegal search and seizure could resist producing before the grand jury evidence discovered during the course of an unlawful search, *Silverthorne Lumber Co. vs. United States, supra*, the Court upheld the claim of the witness.[7] Mr. Justice Holmes' opinion for the Court eloquently rebuts the government's contentions in the instant case:

> "The Government now, while in form repudiating and condemning the illegal seizure, seeks to maintain its right to avail itself of the knowledge obtained by that means which otherwise it would not have had.
>
> "The proposition could not be presented more nakedly. It is that although of course its seizure was an outrage which the Government now regrets, it may study the papers before it returns them, copy them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them; that the protection of the Constitution covers the physical possession but not any advantages that the Government can gain over the object of its pursuit by doing the forbidden act.
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> * * *
>
> "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be

[7] In light of *Silverthorne*, it is difficult to understand Mr. Justice White's observation in *Gelbard vs. United States*, 408 U.S. 41 (1972) that 18 USC §2515 "unquestionably works a change in the law with respect to the rights of grand jury witnesses" by excusing them from producing evidence discovered by unlawful electronic surveillance. *Id.*, at 70.

proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed." *Id.*, at 391, 392.

2. In support of its proposed absolute rule, the government purports to be balancing the interests by urging that the recognition of the right of a grand jury witness to assert Fourth Amendment objections would result in intolerable interference with the independent[8] proceedings of the grand jury to the great detriment of the administration of justice, while contributing little to the deterrent effect of an exclusionary rule which is of dubious efficacy anyway. This analysis loads the scales to point in favor of the government by grossly distorting the competing interests involved.

The interest at stake on the side of the victim of an illegal search and seizure subpoenaed to tell the grand jury more about it is not merely, or even primarily, the en-

[8] In fact, the grand jury is not independent of either the prosecution or the judiciary. Whatever the origins of the grand jury, it must surely be conceded that the modern day version operates under the direction and control of the prosecution, particularly as to the determination of witnesses to be called and evidence to be elicited. This Court acknowledged as much in *United States vs. Dionisio*, 410 U.S. 1, 17 (1973) when it observed that "[t]he grand jury may not always serve its historic role as a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor . . ." The Court has previously noted that the grand jury "remains an appendage of the court, powerless to perform its investigative function without the court's aid, because powerless itself to compel the testimony of witnesses." *Brown vs. United States*, 359 U.S. 41, 49 (1959). See generally Schwartz, *Demythologizing the Historic Role of the Grand Jury*, 10 Am. Crim. L. Rev. 701 (1972).

hancement of the deterrent effect of the exclusionary rule[9], but rather the prevention of a further invasion of that privacy which the Fourth Amendment was designed to protect. See *Warden vs. Hayden*, 387 U.S. 294, 304 (1967); *Katz vs. United States*, 389 U.S. 347, 351 (1967). In the ordinary exclusionary rule situation, where the invasion of the victim's privacy has already been completed, this Court has pointed out that the exclusionary rule is applied only for the purpose of deterring future illegal invasions of privacy and that it does nothing to prevent, correct or restore the rupture of privacy which has already occurred. *Linkletter vs. Walker*, 381 U.S. 618, 636 (1965). Here, the government has conceded that it intends to question respondent Calandra about the items seized during the search in issue (A. 75), thereby expanding the invasion of privacy directly resulting from the illegal search and seizure.

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[9] Of course the deterrent effect of the exclusionary rule is also at stake in this case, as each exception engrafted on the Holmes dictum that illegally acquired evidence "shall not be used at all", *Silverthorne Lumber Co. vs. United States*, *supra*, at 392, enhances the government's incentive to seek such evidence. The rule sought by the government in this case (added to such previous exceptions as standing, *Alderman vs. United States*, 394 U.S. 165, 173 (1968); harmless error, *Chapman vs. California*, 386 U.S. 18, 44 n. 2 (1967) (Mr. Justice Stewart concurring); attenuation, *Wong Sun vs. United States*, 371 U.S. 471 (1963); impeachment, *Walder vs. United States*, 347 U.S. 62 (1954); and inducement of plea, cf. *McMann vs. Richardson*, 397 U.S. 759 (1970)), would certainly render the government's claim of the exclusionary rule's ineffectiveness a self-fulfilling prophecy. The adoption of the government's position in this case would provide it with the inducement for burglarizing the premises of the next Daniel Ellsberg, as well as those of his psychiatrist, where indictments are desired for their discrediting, harassing, or chilling effect on the government's "enemies".

Unlike the usual suppression situation, the cat is not yet all the way out of the bag,[10] the government, having extracted one paw by the unlawful search, now seeks to use the grand jury to extract the remainder of the feline discovered during the course of the search. Accordingly, the judgments of the district court and court of appeals, protecting Calandra from such questioning, operate to prevent a threatened further invasion of his privacy and not just to deter unrelated future episodes. This Court recognized the vital privacy interest of a witness subpoenaed before the grand jury to expand upon evidence obtained by an illegal invasion in *Gelbard vs. United States*, 408 U.S. 41 (1972):

> "Contrary to the Government's assertion that the invasion of privacy is over and done with, to compel the testimony of these witnesses compounds the statutorily proscribed invasion of their privacy by adding to the injury of the interception the insult of compelled disclosure." *Id.*, at 51-52.[11]

This observation applies with equal logic and is an interest entitled to even greater weight in the case of the violation of a *constitutionally* protected right. Thus, it is not this Court's devotion to the exclusionary rule *remedy*

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[10] The cat and bag metaphor has been previously employed by the Court with respect to the analogous area of confessions, observing in *United States vs. Bayer*, 331 U.S. 532 (1947) that:

"Of course, after an accused has once let the cat out of the bag by confessing . . . [h]e can never get the cat back in the bag. The secret is out for good." *Id.*, at 540.

[11] Thus the Court rejected the government's contention, strikingly similar to that advanced in this case, that:

"[t]he invasion of privacy, if any, is completed, by the time of the grand jury appearance. The questions propounded do not further invade the witness' privacy. They simply call for the kind of non-privileged evidence every citizen is obligated to provide." Brief for the United States at 30 n. 11, *United States vs. Egan*, 408 U.S. 41 (1972).

that is tested by this case, but rather its fidelity to the Fourth Amendment *right* of privacy itself that is in issue.

For its interest the government asserts that the recognition of the privilege asserted by respondent Calandra would result in intolerable interference with grand jury proceedings and a consequent breakdown in the administration of the criminal laws. However, this naked assertion is unsupported by either empirical or jurisprudential evidence of such disastrous consequences in prior experience. There is no evidence that the operation of grand juries and the administration of criminal justice have been seriously jeopardized by the extension to grand jury witnesses of traditional constitutional, statutory and common law privileges,[12] nor that the efficiency of grand juries and the administration of justice have been substantially impaired in the Sixth Circuit since the decision below, as compared to the experience in the Ninth and Second Circuits since their Courts of Appeals' divergent resolution of this issue in *Carter vs. United States,* 417 F.2d 384 (9th Cir. 1969) and *United States ex rel. Rosado vs. Flood,* 394 F.2d 139 (2nd Cir. 1968). Nor is there any evidence that this Court's decision in *Gelbard vs. United States, supra,* has resulted in the evils predicted by the government's argument *ad horrendum.*

Nor is the government's fear of protracted interruption of grand jury proceedings supported by the particular facts of this case. No such delay or interruption took place as a result of respondent Calandra's assertion of his Fourth Amendment claim. The government was required to interrupt the grand jury proceedings for an immunity hearing before the court pursuant to 18 USC §2514 (A.

[12] See cases and privileges cited at footnote 5, *supra.*

30).[13] The continuance of the hearing from August 17 to August 27 was attributable to respondent Calandra's right to advance notice under Rules 5(a), (b) and 6(d), Fed. R. Civ. P. (A. 35-36, 95a). The government admitted that the questions it intended to put to Calandra before the grand jury were based upon the items seized during the search in issue (A. 75). No "full blown suppression hearing"[14] was required, as the invalidity of the search warrant was determinable from the face of the affidavit, and the facts pertaining to the scope of the search were adduced through uncontroverted affidavits (A. 46-49). In effect, the "hearing was short in duration and largely devoted to the arguments of counsel on an agreed statement of facts."[15] (A. 51-80). The substantial delay incident to the government's appeal of the district court's

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[13] Even under 18 USC §6003, which apparently contemplates no immunity hearing before the court, the government would be required to interrupt the grand jury proceedings and bring the witness before the court to enforce the duty to testify. See *Brown vs. United States*, 359 U.S. 41 (1959):

"It is the court's process which summons the witness to attend and give testimony, and it is the court which must compel a witness to testify if, after appearing, he refuses to do so.

"When the petitioner first refused to answer the grand jury's questions, he was guilty of no contempt. He was entitled to persist in his refusal until the court ordered him to answer. Unless, therefore, it was to be frustrated in its investigative purpose, the grand jury had to do exactly what it did—turn to the court for help. If the court had ruled that the privilege against self-incrimination had been properly invoked, that would have been the end of the matter. Even after an adverse ruling upon his claim of privilege, the petitioner was still guilty of no contempt. It was incumbent upon the court unequivocally to order the petitioner to answer." *Id.*, at 49-50.

Furthermore, the government would be required to bring the witness before the court for judicial proceedings to impose sanctions for the refusal to comply with the order to testify, pursuant to either 28 USC §1826 or Rule 42, Fed. R. Crim. P.

[14] *Gelbard vs. United States, supra*, at 70 (Mr. Justice White concurring).

[15] *Id.*, at 74 (Mr. Justice Rehnquist dissenting).

ruling is, of course attributable to the government and not to respondent Calandra.[16] In the interim the only evidence of which the grand jury has been deprived is evidence that the government concedes it would not have had but for the unlawful search and seizure (A. 75).

Nor need this Court fear that its recognition of respondent Calandra's Fourth Amendment rights would open the door to spurious Fourth Amendment claims asserted in bad faith for the purpose of delay. As noted by Mr. Justice Douglas in *Russo vs. United States,* 404 U.S. 1209 (1971), "There must be some credible evidence that the prosecution violated the law before ponderous judicial machinery is invoked to delay grand jury proceedings." *Id,* at 1210. Of seemingly equal application to Fourth Amendment claims is Mr. Justice White's dictum in *Gelbard vs. United States, supra,* precluding the utilization of spurious electronic surveillance claims for purposes of delay, that "Of course, where the government officially denies the fact of electronic surveillance of the witness, the matter is at an end and the witness must answer."[17] *Id,* at 71. The Court has indicated its faith in the ability of the judiciary to expeditiously separate the wheat from the chaff on a case by case basis with respect to newsmen's claims of a novel First Amendment privilege, *Branzburg*

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[16] Ordinarily the denial of a pre-indictment motion to suppress could not be appealed by the movant. *DiBella vs. United States,* 369 U.S. 121 (1962).

[17] Perhaps this proposition ought to be reconsidered in light of subsequent revelations about the conduct of the executive branch of the government.

vs. Hayes, 408 U.S. 665 (1972).[18] Such task could be at least as, if not more, efficaciously performed with respect to Fourth Amendment claims, made against a background of a substantial body of interpretive case law.

In short, the government has failed to show a substantial deleterious effect on the effectiveness of the grand jury such as to justify the dissipation of the substantial Fourth Amendment rights of privacy involved. The reversal sought by the government could be justified only by a naked choice of grand jury efficiency over Fourth Amendment privacy. This would be a sorry choice of values for a nation tottering on the brink of a constitutional crisis as a result of governmental disdain for that which Mr. Justice Brandeis characterized as "the right most valued by civilized men."[19] *Olmstead vs. United States*, 277 U.S. 438, 478 (1928) (dissenting opinion).

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[18] See concurring opinion of Mr. Justice Powell at 710:

"Indeed, if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the Court on a motion to quash and an appropriate protective order may be entered. The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions."

[19] Lest it be contended that the value of privacy has declined since the Brandeis observation, see Mr. Justice Stewart's cogent articulation of its continuing importance in *Coolidge vs. New Hampshire*, 403 U.S. 443 (1971):

"In times not altogether unlike our own they [the authors of the Constitution] won—by legal and constitutional means in England, and by revolution on this continent—a right of personal security against arbitrary intrusions by official power. If times have changed, reducing every man's scope to do as he pleases in an urban and industrial world, the changes have made the values served by the Fourth Amendment more, not less, important." *Id.*, at 455.

B. THE VICTIM OF AN UNLAWFUL SEARCH AND SEIZURE HAS STANDING TO RAISE FOURTH AMENDMENT OBJECTIONS TO GOVERNMENT EFFORTS TO COMPEL HIM TO ANSWER QUESTIONS ABOUT THE ILLEGALLY SEIZED ITEMS, NOTWITHSTANDING THAT HE IS OFFERED IMMUNITY FROM PROSECUTION.

Unsatisfied by the evidence seized during its search of respondent Calandra's premises, the government sought to enlarge its invasion of Calandra's privacy by compelling him to appear before the grand jury to answer questions about the items seized. Calandra seeks to resist the effort, not for the purpose of preventing the introduction of evidence already disclosed, against himself or others, but rather to prevent the government from further invading his privacy, by compelling disclosure of additional matters, as a direct result of the unlawful search.

The government's contention that Calandra's privacy interest is vindicated by a grant of immunity from prosecution confuses the Fourth Amendment right (privacy) with the remedy (the exclusionary rule). Such confusion is unwarranted in the face of this Court's clear exposition of the difference between the right and the remedy in *Jones vs. United States,* 362 U.S. 257 (1960):

> "The restrictions upon searches and seizures were obviously designed for protection against official invasion of privacy and the security of property. They are not exclusionary provisions against the admission of kinds of evidence deemed inherently unreliable or prejudicial. The exclusion in federal trials of evidence otherwise competent but gathered by federal officials in violation of the Fourth Amendment is a means for making effective the protection of privacy." *Id.,* at 261.

Accordingly the Court defined "person aggrieved by an unlawful search and seizure", within the meaning of Rule 41(e), Fed. R. Crim. P., to mean:

> "victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else." *Id.*[20]

That the Fourth Amendment protects the right of privacy from unreasonable searches and seizures wholly apart from their potential for incrimination was established beyond question by this Court's decision in *Camara vs. Municipal Court*, 387 U.S. 523 (1967). Thus, while a grant of immunity vindicates the constitutional interest protected by the Fifth Amendment privilege against self-incrimination, it does nothing to vindicate the right of privacy protected by the Fourth Amendment.

The government's contention that a grant of immunity deprives a grand jury witness of standing to assert his Fourth Amendment rights was specifically rejected in *Hale vs. Henkel*, 201 U.S. 43 (1906). The Court held that an immunity grant, although an adequate answer to the witness' claim of the privilege against self-incrimination, did not preclude him from asserting Fourth Amendment objections to compliance with a grand jury subpoena. The Court's ruling was predicated upon its understanding that the cases

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[20] The *Jones* definition of "person aggrieved" was subsequently held to be the constitutional standard of standing as well in *Alderman vs. United States*, 394 U.S. 165, 173 n. 6 (1968). The *Alderman* dicta that

> "There is no necessity to exclude evidence against one defendant in order to protect the rights of another. No rights of the victim of an illegal search are at stake when the evidence is offered against some other party." *Id.*, at 174,

was uttered in the context of a non-victim criminal defendant seeking to assert the Fourth Amendment rights of a third party search victim, and is not applicable to a case such as this where the victim seeks to assert his own right to prevent a further invasion of his privacy. The Court recognized this when it added:

> "The victim can and very probably will object for himself when and if it becomes important for him to do so." *Id.*

> "... treat the Fourth and Fifth Amendments as quite distinct, having different histories and performing separate functions." *Id*, at 72.

Similarly, in *United States vs. Egan*, 408 U.S. 41 (1972), this Court upheld the privacy claim of grand jury witnesses notwithstanding that they had been granted transactional immunity. *Id*, at 45.

In sum, the government's standing argument flies in the face of constitutional policy, logic and precedent, and is, in fact, frivolous.

CONCLUSION

For the foregoing reasons the judgments of the district court and court of appeals should be affirmed.

Respectfully submitted,

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July 1973